IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFERY GOODMAN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
ESPE AMERICA, INC,	:	NO. 00-CV-862
	:	
Defendant.	:	

JOYNER,J. **JANUARY , 2001**

MEMORANDUM

Plaintiff Jeffery Goodman ("Plaintiff") has brought an employment discrimination case against Defendant ESPE America, Inc. ("ESPE"). Presently before the Court is ESPE's Motion to Compel Arbitration and For Dismissal of Plaintiff's Complaint. For the reasons that follow, we will grant ESPE's Motion and dismiss the case without prejudice.

BACKGROUND

ESPE is a wholly owned American subsidiary of the German corporation ESPE Dental-Medizin GmbH & Co., KG. Plaintiff was employed as ESPE's President beginning in December 1996. Prior to being hired, Plaintiff signed an employment contract that contained among its terms the following arbitration provision:

> **8. Arbitration**. . . . [any] controversy, dispute or difference arising out of or relative to this Agreement or an alleged breach thereof or otherwise relating to the Employee's employment with the Company shall be submitted to settlement by arbitration in Montgomery County, Pennsylvania, before a neutral arbitrator mutually agreeable to both parties pursuant to the Labor Arbitration Rules of the American Arbitration

> Association. . . . . The decision of the arbitrator shall be final and binding on the parties and judgment upon any award of the arbitrator may be entered in any court having jurisdiction as an enforceable judgment or decree. The prevailing party shall be entitled to an award which shall include all costs of arbitration, including a reasonable attorney's fee.

Plaintiff was terminated by ESPE in March 1998. In February 2000, Plaintiff filed the present action, alleging various violations of Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act. Based on the above provision in Plaintiff's employment contract, ESPE now seeks to compel arbitration of this dispute.

DISCUSSION

I. Legal Standard

A motion to compel arbitration is treated like a summary judgment motion. See, e.g., Wilson v. Darden Restaurants, Inc., CIV.A. No. 99-5020, 2000 WL 150872, at *2 (E.D. Pa. Feb. 11, 2000). Accordingly, when evaluating the instant motion, we will construe all facts in the light most favorable to Plaintiff, see Carter v. Exxon Co., USA, 177 F.3d 197, 202 (3d Cir. 1999), and follow the general dictates of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

II. Federal Arbitration Act

ESPE moves to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA" or "the Act"). The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate . . . ." John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 136 (3d Cir. 1998) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). Pursuant to the Act, courts must recognize the "liberal federal policy favoring arbitration agreements." Moses H. Cone, 460 U.S. at 24. Indeed, there is a strong presumption in favor of arbitrability, and any doubts "concerning the scope of arbitrable issues should be resolved in favor of arbitration." Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 228 (3d Cir. 1997) (quoting Moses H. Cone, 460 U.S. at 24-25).

When a party "to a binding arbitration agreement is sued in federal court on a claim that the plaintiff has agreed to arbitrate, it is entitled under the FAA to a stay of the court proceeding pending arbitration . . . and an order compelling arbitration." Seus v. John Nuveen & Co., 146 F.3d 175, 179 (3d Cir. 1998), cert. denied, 525 U.S. 1139, 119 S. Ct. 1028, 143 L. Ed. 2d 38 (1999); see also 9 U.S.C. § 3. Thus, the district court must determine if there is a valid arbitration agreement and, if so, whether the claims fall within the scope of that agreement. See John Hancock, 151 F.3d at 137; Stanton v. Prudential Life Ins. Co., CIV.A. No. 98-4989, 1999 WL 236603, at *2 (E.D. Pa. Apr. 20, 1999). If a court concludes that all the

claims in an action are arbitrable, it may dismiss the action. See, e.g., Seus, 147 F.3d at 179.

III. Plaintiff's Claims

It is undisputed that Plaintiff signed the contract containing the arbitration provision at issue and that, under its broad terms, the provision encompasses the specific dispute in this case. However, Plaintiff argues that the arbitration provision is unenforceable for several reasons. We examine each of Plaintiff's arguments individually.

First, Plaintiff argues that the arbitration provision is unenforceable because the FAA does not apply to employment contracts. This argument fails because it is flatly contradicted by controlling precedent of this Circuit. See, e.g., Seus, 146 F.3d at 178 ("[FAA's] 'contract of employment' exception is limited to the contracts of employees who . . . are engaged directly in the channels of interstate commerce."); Great W. Mortgage, 110 F.3d at 226-27 (rejecting argument that FAA excludes all employment contracts and citing Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of America, 207 F.2d 450, 452 (3d Cir. 1952) (en banc)); see also Blair v. Scott Specialty Gases, No. CIV.A. 00-3865, 2000 WL 1728503, at *8 (E.D. Pa. Nov. 21, 2000) ("the Third Circuit has held that the FAA does apply to employment contracts"); Montgomery v. Earth Tech Remediation Servs., CIV.A. No. 99-5612, 2000 U.S. Dist. LEXIS 2736, at *3 (E.D. Pa. Feb. 29, 2000) (recognizing Third Circuit precedent that FAA applies to all employment contracts except those of

employees like seaman or railroad workers who are actually involved in interstate commerce).[1]

Next, Plaintiff contends that the arbitration provision did not give him sufficient notice that he was waiving his statutory claims under Title VII. In turn, Plaintiff asserts that he did not knowingly and willingly waive his statutory rights, and therefore, should not be forced to arbitrate those claims. Plaintiff's argument is premised on the notion that the language of the arbitration provision was too broadly worded to have provided him with adequate notice. We disagree.

The specific argument forwarded by Plaintiff has been rejected previously, and courts have routinely enforced broadly worded arbitration provisions. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (involving clause requiring arbitration of "any dispute, claim or controversy arising between him and [the other party]"); Great W. Mortgage, 110 F.3d at 228-29 (rejecting lack of notice argument in case involving clause requiring arbitration of "any dispute related to [the employee's] employment"); Sena v. Gruntal & Co., LLC, CIV.A. No. 99-3042, 1999 WL 732974, at *3 (E.D. Pa. Sept. 21, 1999) (same, in case involving clause requiring arbitration of "any dispute . . . arising out of or relating to any of [plaintiff's] accounts with

[1] Plaintiff does not allege that he is an employee "engaged directly in the channels of interstate commerce." Instead, Plaintiff makes much of the fact that the United States Supreme Court has granted certiorari in Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), cert. granted, 120 S. Ct. 2004 (2000). While the Supreme Court's ultimate resolution of Circuit City may or may not alter the law with respect to issues presented in this case, there are no grounds at this time for disregarding the clear precedent currently in force in this Circuit.

[defendant]"). In addition, Plaintiff does not provide any evidence that he failed to read the agreement, that ESPE concealed the terms of the agreement, or that there was any other recognized ground for not enforcing the agreement. See Seus, 146 F.3d at 183-84 (rejecting applicability of heightened "knowing" and "voluntary" standard and noting that "[n]othing short of a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts" allows the court to avoid enforcement of arbitration agreement); Great W. Mortgage, 110 F.3d at 228-29 (rejecting claim that more specific notice was necessary for provision to be valid). In view of the above authority and the lack of any countervailing allegations by Plaintiff, we find that the arbitration clause is enforceable despite its broad scope.

Finally, Plaintiff argues that the "loser pays" clause[2] of the arbitration provision denies him his substantive right to an effective and accessible forum. Plaintiff draws support from several cases holding that arbitration provisions that require plaintiffs to pay a substantial portion of the costs of arbitration are invalid. See, e.g., Shankle v. B-G Maintenance Mgmt. of Colorado, Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) (invalidating agreement that required plaintiff to pay one-half of arbitrator's fees to invoke arbitration procedure); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (finding that arbitration agreement requiring employee to

[2] The clause states: "The prevailing party shall be entitled to an award which shall include all costs of arbitration, including a reasonable attorney's fees."

pay one-half of costs and "steep filing fees" is unenforceable); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (finding that "an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims under Title VII"). Other courts, however, have reached different conclusions. See, e.g., Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 763-64 (5th Cir. 1999) (rejecting Cole's reasoning and finding that public policy not violated when plaintiff was required to pay $3,650 in arbitration costs pursuant to mandatory fee-splitting provision), cert. denied, -- U.S.--, 120 S. Ct. 1833, 146 L. Ed. 2d 777 (2000); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 16 (1st Cir. 1999) (refusing to invalidate arbitration agreement with fee-splitting provision because fees not yet levied and judicial review available; and noting that arbitration often more affordable for plaintiffs than litigation); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 366 (7th Cir. 1999) (adopting Rosenberg analysis), cert. denied, 528 U.S. 811, 120 S. Ct. 44, 145 L. Ed. 2d 40 (1999); McCaskill v. SCI Mgmt. Group, No. 00-1543, 2000 WL 875396, at *3-*4 (N.D. Ill. June 22, 2000) (granting motion to compel where no evidence that plaintiff's payment of half of arbitration costs "would be prohibitively expensive for her."); Arakawa v. Japan Network Group, 56 F. Supp. 2d 349, 354-55 (S.D.N.Y. 1999) (granting motion to compel despite fee-splitting provision when it was still unclear if plaintiff would have to

pay fees, and if so, how much); Palmer-Scopetta v. Metropolitan Life Ins. Co., 37 F. Supp. 2d 1364, 1370 (S.D. Fla. 1999) (same).

To date, neither the Supreme Court, nor the Third Circuit has addressed this precise question. The Supreme Court did, however, recently discuss a related issue that is instructive in our determination in this case. In Green Tree Fin. Corp. v. Randolph, No. 99-1235, 2000 U.S. LEXIS 8279, 121 S. Ct. 513, 148 L. Ed. 2d 373 (Dec. 11, 2000), the Supreme Court held that an arbitration agreement that is silent as to whom is responsible for arbitration costs is still enforceable despite the risk that it may subject a plaintiff to substantial costs. Id. at *20-*22 (reversing Eleventh Circuit on cost question).[3] The record in Green Tree lacked any information about the costs plaintiff would bear, and plaintiff's arguments were based solely on unfounded assumptions about such potential costs. Id. at *21 & n.6, *22 (stating that party seeking to invalidate arbitration provision on grounds that arbitration would be too expensive "bears the burden of showing the likelihood of incurring such costs."). As a result, the Supreme Court found that the plaintiff's risk that she "will be addled with prohibitive costs is too speculative to justify invalidation of an arbitration agreement." Id. at *21 (noting that invalidation on such basis would violate liberal policy favoring arbitration) (emphasis added).

[3] Before reaching this question, the Supreme Court affirmed the Eleventh Circuit's decision that an order compelling arbitration and dismissing the underlying claims is a "final decision" within the meaning of the FAA and, therefore, is immediately appealable. Green Tree, 2000 U.S. LEXIS 8279, at *16.

Although Plaintiff's argument in this case is not without some superficial appeal, the particular arbitration provision at issue here is distinguishable from those involved in the cases cited by Plaintiff. More fundamentally, we find that this case closely resembles the facts of the Rosenberg line of cases and that the reasoning by those courts, as well as the Supreme Court's recent pronouncements in Green Tree, are equally persuasive here.

As an initial matter, Plaintiff has not alleged that imposition of arbitration costs would preclude him from arbitrating his claims, and the limited record before us suggests otherwise.[4] See Williams, 197 F.3d at 763-64 (enforcing arbitration agreement where no evidence plaintiff could not afford fees); Blair, 2000 WL 1728503, at *7 (same); McCaskill, 2000 WL 875396, at *3 (same). In addition, no evidence has been presented here to indicate what costs plaintiff would incur or how prohibitively expensive those costs would be. See Green Tree, 2000 U.S. LEXIS 8279, at *20-*22; see also Witz v. Apps, No. 00-C-3662, 2000 U.S. Dist. LEXIS 16791, at *5-*7 (N.D. Ill. Nov. 14, 2000) (holding that risk of costs and attorney's fees does not invalidate arbitration clause).

Perhaps more significantly, and in contrast to the cases cited by Plaintiff, the arbitration agreement in this case neither requires up-front payment of costs before commencing an

[4] Unlike the Plaintiff in Shankle who was a relatively low-level employee with limited financial means, Plaintiff here was President of ESPE. Moreover, the record reveals that Plaintiff received $80,000 in compensation upon his termination, as well as over $2,000 for accrued vacation.

action nor mandates the splitting of costs after conclusion of the case. Indeed, not only is the arbitration provision silent as to any initial costs and filing fees, the provision by its terms suggests that Plaintiff is not liable for any costs at any time if his claim is successful. While the potential of having to pay costs and attorney's fees if unsuccessful may deter some plaintiffs from bringing marginal cases, it is far less a deterrence than ordinary fee-splitting arrangements or the large initial deposits involved in other cases, see, e.g., Shankle, 163 F.3d at 1234-35 (employee required to pay half of costs estimated at $1,875-$5,000 before commencing action). Moreover, at this point Plaintiff has not been assessed with any fees, nor is it certain that he ever will be. Cf. Green Tree, 2000 U.S. 8279, at *20-*22 (finding that mere risk of prohibitive costs insufficient to invalidate arbitration agreement); Rosenberg, 170 F.3d at 17 (refusing to invalidate arbitration provision with fee-splitting clause because no fees yet imposed); Arakawa, 56 F. Supp. 2d at 355 (same). Given these facts, we cannot conclude that the arbitration agreement constitutes a barrier to vindication of Plaintiff's rights. Plaintiff's speculation about prohibitive costs is just that -- speculation; this is not enough to invalidate an otherwise enforceable arbitration provision. For all the reasons above, we hold that the "loser pays" provision in the agreement is enforceable and does not deny Plaintiff an effective and accessible forum.

CONCLUSION

We will grant ESPE's Motion and will dismiss this case without prejudice. An appropriate order follows.

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Defendant.	:	

ORDER

AND NOW, this day of January, 2001, upon consideration of Defendant's Motion to Compel Arbitration (Document No. 8), and Plaintiff's Response thereto, it is hereby ORDERED that Defendant's Motion is GRANTED and that this case is DISMISSED WITHOUT PREJUDICE.

BY THE COURT:

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J. CURTIS JOYNER, J.